



Commonwealth of Massachusetts State Ethics Commission

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CONFLICT OF INTEREST OPINION EC-COI-89-9

FACTS:

You are a newly elected member of the General Court. Prior to January 1, 1989, you were the owner and president of ABC, a family owned company. You purchased the business in 1983, and you and your wife served as co-owners until 1989. Both of you worked in the business, which operates out of an office located at your residence which you and your wife jointly own. The business was incorporated in 1987 with you serving as president and your wife as treasurer.

In 1988, you turned the business over to your wife for no consideration and relinquished your corporate presidency. Since January 1989 you no longer receive compensation for any services for ABC. You are frequently in the ABC office, however, and answer questions from customers and your wife. You continue to assist your wife in making business decisions relating to the operation of ABC. Although you are not present the office during most working hours, you participate in the management of the business, albeit not as the company president.

You indicate that in March 1989, you and your wife may jointly purchase a building in which you would relocate the operation of the ABC business. ABC provides pest control services to some state, county and municipal agencies.

QUESTIONS:

1. Do you have a financial interest in contracts made by ABC?
2. Assuming that you do, does G.L. c. 268A permit you to retain your financial interest in contracts made by ABC with state, county and municipal agencies?

ANSWERS:

1. Yes.
2. The propriety of your retaining your interest in these contracts is subject to the discussion set forth below.

DISCUSSION:

1. Financial Interest

As a member of the General Court, you are a state employee for the purposes of G.L. c.

268A. As a state employee, you are subject to the restrictions of G.L.c. 268A s.7 which, with certain exceptions, prohibits a state employee from having a financial interest in a contract made by a state agency. Until 1989, you had a financial interest in contracts made by ABC with state agencies in light of your relationship with ABC as a co-owner and president who received income for your services. Notwithstanding your recent divestiture to your wife of your interest in ABC, we conclude that you retain a financial interest in ABC and, therefore, in any contracts made by ABC. In effect, the financial interest which your wife may have in contracts made by ABC will continue to be attributable to you.

In determining whether the financial interest of a non-state employee spouse is attributable to the state employee spouse, the Commission will examine the divestiture and subsequent relationship to ascertain whether the employee can fairly be said to still have a financial interest in the spouse's contract. Buss, *The Massachusetts Conflict of Interest Law: An Analysis*, 45 B.U. Law Review, 299, 375 (1965). Where, notwithstanding divestiture, a state employee retains either a role in the management or control of the spouse's company, or an unliquidated financial stake in the company, the Commission will attribute the spouse's financial interest to the state employee. On the other hand, where the spouse's business is independently capitalized, and where the spouse does not look to the state employee to share in the management or control of the business, the Commission will not deem attribution warranted. See, EC-COI-83-111 (attribution found where state employee transferred to his spouse for no consideration land to be sold to employee's state agency); 83-37 (attribution found where state employee transferred partnership interest to spouse for no consideration and spouse had no prior experience in partnership business); 83-125 (attribution found where state employee capitalised spouse's company, operating out of their home, and where employee regularly participates in company's financial decisions); 85-24 (attribution found where employee shares in management and control of spouse's business); 83-123 (no attribution found where state employee transfer was based on an arm's length transaction and asset liquidation to spouse who had independent experience in business).

In light of these principles, we conclude that you retain a financial interest in your spouse's company and that her financial interest in contracts made by the state will be attributed to you for the purposes of s.7. Our conclusion is based on the fact that

- (a) no money passed hands in your transfer of the business to your wife;
- (b) your initial investment in the company was not liquidated;
- (c) you continue to participate in the management and control of the company; and
- (d) you continue to own the property from which the business operates, and would continue to do so under your proposed relocation plans.

While a restructuring of your relationship with ABC might lead to a reconsideration of

this conclusion, EC-COI-84-13, any restructuring would have to remove you from any continuing financial or managerial relationship with ABC.

2. Application of G.L. c. 268A

In light of the foregoing, you have a financial interest in any contract made by ABC. To the extent that ABC contracts with state agencies such as a community college and a state correctional facility, your financial interest in those contracts will violate s.7. No exemption is available to you because the propriety interest of you and your family in ABC exceeds 10%. G.L. c. 268A, s.7(c). Under s.7(a), you will have thirty days from receipt of this opinion to divest your financial interest in these contracts. Nothing in G.L. c. 268A prohibits you from serving as a member of the General Court and having a financial interest in a contract made by a county or municipal agency such as a housing authority.

Should matters come before you in your legislative capacity involving any of the county or municipal agencies with which ABC contracts, you should observe the safeguards and limitations of G.L. c. 268A, s.23. In particular, prior to your legislative participation in such matters, you should publicly disclose the relevant facts. G.L. c. 268A, s.23(b)(3). You may satisfy the disclosure requirement with either a letter to the Commission or a notice of the Clerk of the House of Representatives to be inserted in the House Journal.[1]

DATE AUTHORIZED: March 8, 1989

[1] We understand that you also serve as a member of a municipal agency. While G.L. c. 268A, s.20 would limit your having a financial interest in a contract made by the municipal housing authority, a municipal agency, your financial interest may be eligible for an exemption under s.20(b). We suggest that you review the enclosed s.20(b) exemption conditions, particularly the public advertising or competitive bid requirements, and renew your request with us regarding this contract once you have ascertained the relevant facts.